No. 85-710

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

JACK RANDELL, PATRICIA RANDELL,
a/k/a "PATRICIA PEARL", and
MARVIN MANSFIELD,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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36 pp

Question Presented for Review

In a prosecution for the specific intent crimes of mail and wire fraud, where the defense was that petitioners always believed in good faith that the purported "victim" pharmaceutical companies had been aware of the true material facts allegedly misrepresented, yet in concert with petitioners had willingly violated the Robinson-Patman Act, did the trial court commit reversible error and preclude any chance of acquittal by effectively instructing the jury, under strong protest, that regardless of petitioners' beliefs, if the companies' high officials had not specifically made such Robinson-Patman violations into company policy, convictions must be returned?

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JACK RANDELL, PATRICIA RANDELL, a/k/a "PATRICIA PEARL", and MARVIN MANSFIELD,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Parties to the Proceedings Below

JACK RANDELL, PATRICIA RANDELL and MARVIN MANSFIELD* petition for a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit, which affirmed respective judgments of conviction entered in the United States District Court for the Southern District of New York (Hon. Constance Baker Motley, Chief Judge).

* Codefendants Jack Schneider and Louis A. Garruto were also named in the indictment. Schneider was severed for health reasons and was later granted a *nolle prosequi* order. Garruto, who was also convicted, elected not to appeal.

Jurisdiction

The unpublished summary order of the Court of Appeals affirming the judgments of conviction was entered on July 22, 1985 (Appendix "A"). The order of the Court of Appeals denying the petition for rehearing was entered on August 27, 1985 (Appendix "B").

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

Statutes Involved

15 U.S.C. § 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufac-

ture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *And provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce, and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation

of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing,

handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

15 U.S.C. § 13a. Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or ad-

vertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

15 U.S.C. § 13c. Exemption of non-profit institutions from price discrimination provisions

Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin,

obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1962. Prohibited activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * *

26 U.S.C. § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

28 U.S.C. § 1254. Courts of Appeals; *certiorari* appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

* * *

Fed. R. Cr. P. Rule 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Statement of the Case

A. Indictment and Trial

Petitioners and their two co-defendants were jointly charged in a multi-count indictment alleging mail fraud (18 U.S.C. § 1341), Wire Fraud (18 U.S.C. § 1343) and one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1962 [c]) which, for the most part, was based on those alleged frauds, in addition to alleged violations of the New York state bribery statutes. Petitioners JACK RANDELL and MARVIN MANSFIELD were each also indicted and later convicted of several counts of tax evasion (26 U.S.C. § 7201).

In substance, the indictment charged petitioners along with their co-defendants with participating in a scheme through which several named pharmaceutical companies were alleged to have been fraudulently induced into selling pharmaceutical products at discount prices to various entities controlled by petitioner JACK RANDELL.* According to the indictment, such entities were fraudulently represented to have been charitable or not-for-profit institutions which, if true, would have permitted special pricing under the specific exceptions contained within the Federal antitrust laws, the *Robinson-Patman Act* (15 U.S.C. § 13, et seq.).

In essence, that act provides that it is unlawful for a seller of merchandise to discriminate in price between pur-

* There were essentially two alleged schemes. One dealt with the alleged fraudulent use of facilities purportedly associated with the New York City Health and Hospitals Corporation, and the other with the United Cancer Institute (UCI).

chasers of like products, where such discrimination would substantially lessen competition. An exception to the *Robinson-Patman Act* exists, however, for purchasers that are either "charitable institutions" or "not-for-profit organizations" where the merchandise is purchased for use by the organization and not for resale. Accordingly, as to the pharmaceutical industry, charitable, governmental, or not-for-profit organizations are entitled to receive substantial discounts from manufacturers, who, as the evidence at trial established, are nevertheless eager to sell vast quantities of their products to these organizations, despite the greatly reduced price and despite what at first glance may appear to be a substantially reduced margin of profit.

In light of these realities, it became a well known and widely practiced circumvention of the *Robinson-Patman Act*—of which, the government argued, the petitioners took advantage in order to carry out their alleged fraudulent scheme—for a purchaser to represent to manufacturers that it is entitled to special pricing as a not-for-profit organization which is purchasing the products for its own usage, and not for resale. On the other hand, by that same practice, it was contended and proved by petitioners that the drug companies, who in fact are injured by the *Robinson-Patman Act's* restrictions, willingly sell at discount to purchasers such as petitioners under a charade, all the time knowing that petitioners and others like them—of whom there are many—will thereafter resell the products (or "divert" them) back into the marketplace at large profits. The reason for the manufacturers' complicity, it was shown, was that by this arrangement the companies are able to unload heavy inventories of products that, *inter alia,* lost their domination of the market and hence

their competitive edge by virtue of their going off patent, thereby opening the way for other and much cheaper generic brands.

In the course of pre-trial proceedings and all through the six week trial, it was continually stated to the court that the nature of the defense would be that the "victim" pharmaceutical companies had always been aware of the petitioners' true status as wholesalers, as opposed to charitable institutions, when they had agreed to sell their products. It was thus continually contended that petitioners *always believed* that the sales personnel with whom they had dealt, as well as the companies whom such personnel represented, had always known that petitioners were profit making diverters. Hence, there was no fraud and there were no "victims", but only a mutually satisfactory arrangement whereby the manufacturers were always knowing and willing participants in the scheme charged—and thereby co-conspirators with petitioners in merely violating *Robinson-Patman*— as a means through which all concerned were able to circumvent the anti-trust law to their respective advantages.

Through cross-examination of all the companies' representatives and the testimony of defense witnesses, petitioners continually demonstrated to the jury what their beliefs had been based upon. Thus, it was brought out at the trial that diversion was a wide-spread and rampant practice in the industry; the pharmaceutical companies greatly benefited from such resales since diverters provided markets that otherwise might not exist; petitioner JACK RANDELL had been a well-known wholesaler/diverter who was certainly known not to be involved in charitable insti-

tutions; a physical inspection of all of JACK RANDELL's facilities—which sales representatives who sell to charitable institutions are required to undertake—made it readily apparent that RANDELL obviously ran profit-making operations; the absent avalanche of bureaucratic paperwork which otherwise attends all purchases made by the New York City Health and Hospitals Corporation—with which, it was alleged, petitioners had misrepresented that they had been affiliated—clearly demonstrated that petitioners could not have been so connected; and lastly, the *enormous* amounts of pharmaceutical products ordered—in one instance, enough to satisfy the needs of the "State of California"—made it unmistakable that the purchases could not have been for petitioners' own use. In short, the defense at trial, which was always known to the court, the government and the jury, was that petitioners had harbored no intent to defraud since, in light of all the realities attending the pharmaceutical industry and discount purchases made by true charitable institutions, petitioners had continually believed that those who represented the companies were going along with the charade* for their own benefit, and, hence that the companies had always been aware of Petitioners' true status.

B. The Court's Charge

In line with this long established and much argued defense, the Court initially instructed the jury as follows:

> If you find that the manufacturers referred to in the indictment were not intended by defendants to be the

* Each manufacturer's representative testified at trial to the heavy penalties that would be imposed if a company were to be caught violating *Robinson-Patman*. The need for such a charade was thus explained.

> victims of fraud because defendants and the manufacturers both understood that UCI and the clinics were not purchasing discount drugs for their own use and that they were not bona fide non profit organizations, then, of course, you must return a verdict for defendants on the mail fraud and wire fraud counts since co-schemers are not persons intended to be deceived. (Appendix "C").

Nonetheless, in the very next breath—and with the full understanding that petitioners' reliance on their defense was predicated, for the most part, on dealings with sales representatives—the court added the following:

> However, the fact that a salesman, without the knowledge or approval of his company, was a co-schemer with defendants or anyone or more of the defendants does not make the company a co-schemer. You must find that it was company policy, determined by those who had power to make company policy, to violate the Robinson-Patman Act before you may find that a company, as opposed to its salesman, was a co-schemer. (*Id.*)

The defense took vociferous exception to such instruction on the ground that it was "a little bit unfair" to preclude salesmen from binding the company for purposes of the proferred defense, "because nobody that came into this courtroom, even the government's witnesses, could rightfully by themselves tell anyone what company policy was or was not." (Appendix "D" at pp. 6a, 7a). Hence, it was argued that such a determination was never called for by virtue of the true issues at trial.

Following deliberations by the jury, it ultimately found petitioners guilty, *inter alia*, of most of the mail and tax

frauds charged.* As to those counts dealing with one company, however, *i.e.*, Astra Pharmaceuticals, the jury acquitted the petitioners.

C. Post-Verdict Proceedings

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, Petitioners sought a new trial, *inter alia*, based on the alleged error of the Court's charge regarding the instruction on co-schemers. In furtherance of that application petitioners submitted an affidavit of Charles L. Weintraub, Esq., an attorney for severed co-defendant Jack Schneider. Mr. Weintraub averred how, after the trial, he had fortuitously encountered a juror in this case named Norman Freimark. Mr. Freimark had informed him that *although the jury had credited the defense on the fraud and RICO violations*, it "was obligated to follow the Court's instructions that the pharmaceutical companies were not bound by decisions of their salesmen." (Appendix "E", pp. 9a-9b). The Astra acquittals were explained because there the jury believed that high company officials had testified.

The Court denied the motions and thereafter sentenced petitioners as follows: Petitioner JACK RANDELL was sentenced to concurrent terms of imprisonment, the largest of which was five years. PATRICIA RANDELL and MARVIN MANSFIELD were each sentenced to suspended terms of imprisonment and placed on probation. As to each, fines were imposed as well as judgments of forfeiture as to JACK RANDELL and MARVIN MANSFIELD.

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* Petitioner PATRICIA RANDELL was acquitted of those counts arising out of the alleged fraudulent use of the name "United Cancer Institute".

D. The Appeal

On appeal to the United States Court of Appeals for the Second Circuit, it was argued, *inter alia*, as it had been in the earlier Rule 33 motion, that the Trial Court's instructions to the jury on the need for a finding of co-schemer status by high company officials literally precluded the jury from determining the true issues at trial, *viz.*, did Petitioners' actual beliefs as to what the companies as a whole had known about their true status preclude Petitioners' ability to have harbored any intent to defraud? The Court of Appeals thereafter affirmed, stating in part that,

> [t]he further contention that the charge precluded the Jury from finding that appellants believed the companies' salesmen had authority to bind the companies was not raised below . . . and the omission did not amount to plain error . . . (Appendix "A", p. 2a).

A petition for rehearing which sought to demonstrate the Court of Appeals' misapprehension as to Petitioners' actual contention, in that the subject charge had indeed been appropriately protested* and that it had clearly and effectively directed a verdict of guilty, was thereafter denied by the Court on August 27th, 1985 (Appendix "B").

Reasons for Allowance of the Writ

It is Petitioners' argument in seeking a writ of certiorari from this Court, that the Second Circuit, in affirming the judgments of conviction entered by the District Court based on verdicts which, in turn, had been ren-

* It had been earlier noted, in light of Mr. Weintraub's attestation that the jury had reportedly credited the defense, that even were a specifically pointed exception lacking, the charge, which wholly pre-empted the defense, was unquestionably plain error.

dered by a jury that had admittedly credited the defense and that, under appropriate instructions, would have surely acquitted the Petitioners, had so far departed from the accepted and usual course of judicial proceedings as to warrant the exercse of this Court's discretion.

Specifically, on the record before the Court of Appeals, Petitioners had demonstrated beyond question, from an individual juror, that the jury had indeed accepted the fact of Petitioners' actual beliefs and would have therefore acquitted but for the trial judge's charge regarding who had authority to make company policy. The Court of Appeals unmistakeably erred, therefore, in light of the actual "good faith belief" defense to the specific-intent crimes charged, since the challenged portion of the charge, being totally irrelevant to the trial issues before the jury, patently prejudiced Petitioners by absolutely pre-ordaining the consequent convictions.

In this regard, it had been demonstrated on appeal, as well as in the petition for rehearing, that the defense had never been concerned with *who* bound the companies, but only that *whoever had represented* the companies were always believed by Petitioners to have been aware of JACK RANDELL'S true status. Hence, the Court's charge on irrelevant agency principles—which would only have been appropriate had the companies themselves been *charged* as co-schemers—made it "literally impossible" for the jury to accept the defense based on Petitioners' good faith beliefs alone, which had been strenuously, carefully and successfully demonstrated. As counsel predicted, therefore, the charge as given, in fact ". . . directed [a] verdict of guilty" (Appendix "D", p. 7a).

Clearly, in a specific-intent prosecution such as this, where Petitioners were alleged to have defrauded certain pharmaceutical companies, a charge that simply stated that the same companies could not have been "co-schemers" absent the assent of company policy makers, was completely alien to and destructive of the controlling issue before the jury, *viz.*, what did the Petitioners themselves intend, and hence, what did they actually believe? For as the Second Circuit itself has recently recognized, "only a scheme to defraud and not actual fraud is required for conviction under the wire and mail fraud statutes . . . *United States* v. *Andreadis*, 366 F. 2d 423, 431 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967)". *United States* v. *London*, 753 F. 2d 202, 205 (2nd Cir. 1985). What the companies, by their policy makers, *actually* assented to, therefore, had no relevance to the question of the Petitioners' *mens rea*—the sole issue for the jury to consider.

Indeed, because all that is required to be shown is that some actual harm or injury was contemplated by the schemer (*United States* v. *London, supra; United States* v. *Siegel*, 717 F. 2d 9 [2nd Cir. 1983]; *United States* v. *Regent Office Supply Co.*, 421 F. 2d 1174, 1180 [2nd Cir. 1970]), where it cannot be shown that an accused either knew of an alleged fraud, or believed that his conduct in fact amounted to fraudulent representations, a scheme to defraud is simply not sufficiently established. *United States* v. *Pearlstein*, 576 F. 2d 531 (3rd Cir. 1978). Stated differently, a specific intent to defraud is the touchstone of an actionable wire or mail fraud indictment. *United States* v. *Gelb*, 700 F. 2d 875, 879 (2nd Cir.), *cert. denied*, 104 S. Ct. 167 (1983); *United States* v. *Barta*, 635 F. 2d 999 (2nd Cir. 1980), *cert. denied*, 450 U.S. 998 (1981).

In the final analysis, therefore, if a good faith reliance by a defendant on his *perception* of the alleged victim's knowledge of the truth, based in part on his understanding of the victim's enthusiastic participation in the customary practice of the victim's industry, can be properly established to the fact-triers' satisfaction, an intent to defraud has not been sufficiently proven and a complete defense lies. *United States* v. *Williams*, 728 F. 2d 1402, 1404 (11th Cir. 1984); *United States* v. *Cederquist*, 641 F. 2d 1347, 1351 (9th Cir. 1981); *Steiger* v. *United States*, 373 F. 2d 133 (10th Cir. 1967). On this unassailable view, it is completely irrelevant what the victim *himself* actually knew or specifically assented to, as long as it is clear, from analysis of the specific intent of the *accused*, what *he believed* the victim knew. For as noted, actual fraud is of no consequence, since only the *intent of the defendant* gives rise to actionable criminality (*United States* v. *London*, *supra*, *United States* v. *Gelb*, *supra*; *see also*, *United States* v. *Gamble*, 737 F. 2d 853 [10th Cir. 1984]).

The controlling standard, therefore, is that a scheme to defraud, if prosecutable, is one designed to deceive persons of ordinary prudence and comprehension. *United States v. Bohonus*, 628 F. 2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980). Thus, if an accused is found by a jury to have believed in good faith that he neither deceived nor intended to deceive anyone—especially a corporation *which he believed* to have more than "ordinary prudence" in being fully aware of and enthusiastically engaging in a widespread industry practice—then a sufficient scheme to defraud is simply unproven. *United States* v. *Cederquist*, *supra*, *Steiger* v. *United States*, *supra*.

For all the reasons stated, therefore, the trial court's charge so deviated from the controlling issue at trial and so removed the case from the jury, that unmistakable prejudice resulted. In affirming, therefore, the Court of Appeals obviously approved of this result and hence "so far departed from the accepted and usual course of judicial proceedings", or at least, "so far sanctioned" such a departure by the lower court as to call for an exercise of this Court's power of supervision. Sup. Ct. Rules, Rule 17.1(a).

It follows, that since the Supreme Court has yet to specifically and firmly grapple with how such a good faith defense affects the "specific intent" element of the wire/mail fraud statutes, and since we have unequivocally demonstrated, through the Weintraub affidavit, that the jury had in fact accepted the defense, and but for the highly prejudicial and duly protested instruction would have acquitted, the conviction ultimately rendered was the product of gross judicial error which this Court should now review. Because, it is respectfully submitted, the Court of Appeals, based on the expressed rationale for its decision, has not fully appreciated this point, it is prayed that this petition be granted, and the relief requested ordered.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
October 23, 1985

Respectfully submitted,

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APPENDICES

APPENDIX A

Order Affirming Judgments of Conviction

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of August one thousand nine hundred and eighty-five.

Present:

HONORABLE LAWRENCE W. PIERCE
HONORABLE GEORGE C. PRATT
Circuit Judges.

HONORABLE CHARLES E. STEWART, JR.
*District Judge.**

85-1150/85-1152

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK RANDALL, PATRICIA RANDALL, a/k/a "Patricia Pearl," and MARVIN MANSFIELD,

Defendants-Appellants.

Jack Randall, Patricia Randall and Marvin Mansfield appeal from a judgment of conviction of the United States

* United States District Judge sitting by designation.

District Court for the Southern District of New York, Constance Baker Motley, Chief Judge. Following a jury trial, appellants were convicted of violations of Title 18, United States Code Sections 1341 (mail fraud); 1343 (wire fraud); and 1962(c) (RICO). Appellants Jack Randall and Mansfield were also convicted of violations of Title 26, United States Code, Section 7201 (income tax evasion). For the reasons stated below, we affirm the judgment of the district court.

Appellants' convictions arose out of a four year scheme to defraud pharmaceutical manufacturing companies into selling drugs to appellants at discount prices available only to non-profit institutions, *see* 15 U.S.C. § 13(a) (Robinson-Patman Act); 15 U.S.C. § 13(c) (Nonprofit Institutions Act). In actuality, appellants reaped large profits by selling these drugs as wholesalers. To execute their scheme, appellants set up false non-profit clinics which they represented were distributing the drugs.

Appellants introduced evidence at trial to support their defense that they lacked the intent to defraud the pharmaceutical companies because the companies were aware of appellants' scheme. Appellants contend that the jury charge on the co-schemer status of the drug companies' sales representatives precluded the jury from considering appellants' main defense. We find that the district court correctly charged the jury on the co-schemer defense, *see* Joint Appendix at 3607-09. The further contention that the charge precluded the jury from finding that appellants believed the companies' salesmen had authority to bind the companies was not raised below, *id.* at 3664-69; *see* Fed. R. Crim. P. 30, and the omission did not amount to plain error,

see United States v. *Roglieri*, 700 F.2d 883, 888 (2d Cir. 1983).

Measured by the standards of *United States* v. *Martino*, 759 F.2d 998, 1002 (2d Cir. 1985) and *United States* v. *Soto*, 716 F.2d 989, 991 (2d Cir. 1983), we find ample evidence to conclude that the evidence was sufficient to convict appellants. The arguments relating to the denial of motions to sever are unpersuasive. *See United States* v. *Potamitis*, 739 F.2d 784, 790 (2d Cir.), *cert. denied*, 105 S. Ct. 332 (1984). Apropos the court's ruling, we find no abuse of discretion in declining to grant the motion to sever. Nor are we persuaded that the indictment lacked sufficient specificity to define the forfeitable interest.

We therefore affirm the judgments of conviction.

/s/ LAWRENCE W. PIERCE

HONORABLE LAWRENCE W. PIERCE

/s/ GEORGE C. PRATT

HONORABLE GEORGE C. PRATT
Circuit Judges.

/s/ CHARLES E. STEWART, JR.

HONORABLE CHARLES E. STEWART, JR.
District Judge.

APPENDIX B

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of August one thousand nine hundred and eighty-five.

Present:

HONORABLE LAWRENCE W. PIERCE
HONORABLE GEORGE C. PRATT
Circuit Judges.
HONORABLE CHARLES E. STEWART, JR.
*District Judge.**

No. 85-1150

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK RANDALL, PATRICIA RANDALL, a/k/a "Patricia Pearl," and MARVIN MANSFIELD,

Defendants-Appellants.

A petition for a rehearing having been filed herein by defendants-appellants, Jack Randell and Patricia Randell,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ ELAINE B. GOLDSMITH

ELAINE B. GOLDSMITH
Clerk

* United States District Judge sitting by designation.

APPENDIX C

Excerpts from Court's Charge

* * *

The Court: If you find that the manufacturers referred to in the indictment were not intended by defendants to be the victims of fraud because defendants and the manufacturers both understood that UCI and the clinics were not purchasing discount drugs for their own use and that they were not bona fine nonprofit organizations, then, of course, you must return a verdict for defendants on the mail fraud and wire fraud counts since co-schemers are not persons intended to be deceived.

However, the fact that a salesman without the knowledge or approval of his company was a co-schemer with defendants or any one or more of the defendants does not make the company a co-schemer. You must find that it was company policy, determined by those who had power to make company policy, to violate the Robinson-Patman Act before you may find that a company, as opposed to a salesman, was co-schemer.

* * *

APPENDIX D

Excerpts from Exceptions to Charge

* * *

The Court: All right. Now, Mr. Brafman?

Mr. Brafman: Yes. Most respectfully, your Honor, in part two of the court's charge dealing with mail fraud, at page 43, your Honor, the section which the court read concerning co-schemers not fraud victims, most respectfully, I take exception to the second paragraph which reads as follows: "However, the fact that a salesman without the knowledge or approval of his company was a co-schemer with defendants or any one or more of the defendants does not make the company a co-schemer. You must find that it was company policy determined by those who had power to make company policy to violate the Robinson-Patman act before you may find that a company as opposed to its salesmen was a co-schemer."

Your Honor, most respectfully, that one, I think it's just a little bit unfair under the facts of this case to limit it to salesmen, because at varying times salesmen, district managers, regional sales managers were used interchangeably by the witnesses, and to suggest that if a sales rep who is an authorized agent on behalf of the corporation who could bind the corporation for a variety of different types of civil liability could simply be ignored for purposes of this case, and that under the court's charge the jury must find that it was company policy, I don't know whether in the context of this case that has any meaning, because that would require the president and the board of directors to have a formal meeting adopting it as corporate policy and then pass by a resolution in order for us to be able to interject that defense to the charges.

I think more correctly, your Honor, the defense contended by the defendants was that if the jury were to find that the corporation either knowingly or tacitly either was aware or ignored the obvious, then the jury could conclude that the company wasn't defrauded. And I think it's a little bit unfair for the jury to be instructed that they must find that it was company policy, because nobody that came into this courtroom, even the government's witnesses, could rightfully by themselves tell anyone what company policy was or was not.

I mean, the salesmen who said "I am Dorsey Laboratories," for example, was saying to this court and this jury that "what I do is on behalf of the company I work for, that it speaks for the company and it binds the company." I think, most respectfully, we have always been relying and have tried the case accordingly by arguing that those people who were called by the government as representatives of the company spoke for the company, be they sales persons or district managers or regional managers or the persons in charge of their order department.

And I think this unfairly restricts us and makes it literally impossible—I think it's almost a—almost requires a directed verdict of guilty on this issue because the court says "you must find that it was company policy determined by those who had power to make company policy." Well, we don't know who had power to make company policy for the victim companies, and the government had an obligation if that was the law to establish that that was not company policy or that at the time in question those who were in positions of power then did not know about that and didn't adopt it as company policy, and that's clearly not the proof, your Honor.

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APPENDIX E

Affidavit of Charles L. Weintraub, Esq.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

584 CR 253

(CBM)

UNITED STATES OF AMERICA,

against

JACK RANDELL, *et. al.*,

Defendants.

State of New York)
County of New York) ss.:

Charles L. Weintraub, being duly sworn deposes and says:

1. I am a member of the firm of Hoffman, Pollok and Gasthalter, Attorneys for the defendant Jack Schneider in the above Captioned Case.

2. On February 23, 1985, by chance, I happened to meet one of the jurors, Mr. Norman Freimark, who participated in the deliberations which resulted in a finding that the defendants Jack Randell, Patricia Randell, Marvin Mansfield, and Louis A. Garruto were guilty of mail and wire fraud and related offenses.

3. Mr. Freimark was eager to discuss the case and stated that he and several other jurors had remained at the courthouse after the verdict was reached in the hope of discussing the case with defense counsel. When none of the attorneys appeared, the jurors left the courthouse.

4. Mr. Freimark stated that the jury had a difficult time reaching a determination in this case. Concerning the mail fraud, wire fraud and RICO violations, Mr. Freimark stated that the Court's charge that pharmaceutical companies were not bound by the decisions of their salesmen, compelled the jury to find the defendants guilty. To illustrate this point, Mr. Freimark pointed out that the defendants were convicted of all mail and wire fraud counts except those which related to Astra Pharmaceuticals. There, Mr. Freimark noted that the director of sales had testified and the jury determined that Astra was bound by his testimony.

5. Mr. Freimark stated that the jury credited the defense but was obligated to follow the Court's instruction

that the pharmaceutical companies were not bound by decisions of their salesmen.

/s/ CHARLES L. WEINTRAUB

CHARLES L. WEINTRAUB

Subscribed and Sworn
to before me this 27th
day of March, 1985.

/s/ LINDA CALIGUIRI
NOTARY PUBLIC
LINDA CALIGUIRI
Notary Public, State of New York
No. 41-4706191
Qualified in Queens County
Certificate filed in Queens County
Commission Expires March 30, 1985